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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER THOMAS KIMMICK,

Defendant and Appellant.

B290801

(Los Angeles County
Super. Ct. No. SA055745)

APPEAL from an order of the Superior Court of Los Angeles County, Mark E. Windham, Judge. Affirmed.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

On February 25, 2005, defendant and appellant Peter Thomas Kimmick picked up victim Jennifer A. to go to dinner. He began driving in the opposite direction from the restaurant and, when asked by Jennifer where he was going, Kimmick said he wanted to stop by his apartment. At the apartment, Jennifer felt something strike her head and she lost consciousness. When she awoke, Kimmick was kissing her neck and rubbing her breasts outside her clothing. Kimmick threw Jennifer on to her stomach, removed her pants and underpants, and put his penis into her vagina. Jennifer was eventually able to push herself up and away from Kimmick. Kimmick told Jennifer he would drive her home. While in his car, Kimmick drove to a dark street, pulled over to the curb, pushed her out into the street, and drove off. Jennifer and her parents called the police, who advised her to go to a rape treatment center, where Jennifer had a sexual assault examination. Approximately five weeks later, Jennifer positively identified Kimmick in a photographic lineup.

On or about February 6, 2005, Kimmick grabbed victim Kristin C.'s breast and "dropped her off in the middle of 'nowhere.'"

On March 21, 2005, the People charged Kimmick with two counts of forcible rape of Jennifer (Pen. Code, §261, subd. (a)(2); Counts 1 and 2),¹ and assault with intent to commit a felony

¹ All further statutory references are to the Penal Code unless otherwise indicated.

upon Kristin² (§ 220; Count 3). The People subsequently amended the complaint to charge Kimmick with sexual battery upon Kristin. (§ 243.4(a); Count 4). Kimmick pled nolo contendere to Counts 1 and 4 on December 7, 2005. Counts 2 and 3 were dismissed, and Kimmick was sentenced to four years in prison.

On September 27, 2017, Kimmick filed a motion to vacate judgment pursuant to Penal Code section 1473.6. Kimmick alleged his investigator spoke to Jennifer in 2005 and she said that at the time of the rape she was confused and unsure if she had been “physically raped or emotionally raped.” Kimmick also alleged in the petition that Jennifer told another investigator in 2006 that she did not say “stop” or “no” during the encounter. The investigator’s report of the 2006 interview, however, states that she told Kimmick to stop, but he turned up the volume so nobody could hear her. Jennifer told the investigator that she attempted to fight him off and was screaming so much that at some point she “could not scream anymore.” She also explained that she told police detectives that it felt more like an emotional rape because Kimmick was a “really nice guy” when she met him, but changed her mind when she found out he had raped other people and was shown a “book full of criminals” that included Kimmick.

² Kristin C. is variously referred to in the record as Kristen C., Christine C., and Kristin C. We refer to her here as Kristin C., as this is the name that appears in her signed declaration of March 5, 2017.

Kimmick further alleged in his petition that a private investigator interviewed Kristin on March 5, 2017, and she said that police detectives told her that Kimmick was suspected of raping another victim before they began asking her any questions. The report of the interview states that the officers “may have misled her” to answer the way she did and that the incident was “made out to be a lot worse than what really happened.” Kristin signed a declaration that day stating that she and Kimmick agreed to go to a movie on the night of the incident. On the way to the theater, Kimmick asked her if it was okay to stop at his apartment to pick up his wallet. While in the apartment, Kimmick offered to give her a back massage and she said no. They returned to Kimmick’s car. As they were driving, Kimmick told Kristin he was having car trouble and asked if she would get out and push the car. After she got out of the car, Kimmick drove away. Kristin’s declaration does not affirm or deny that Kimmick grabbed her breast.

Kimmick alleged in the petition that Jennifer and Kristin’s statements amount to newly discovered evidence of misconduct by a government official that resulted in a fabrication of evidence that was substantially material and probative on the issue of guilt or punishment within the meaning of Penal Code section 1437.6. On October 19, 2017, the trial court denied the petition.

Kimmick filed a timely appeal, and we appointed counsel to represent him. After examining the record, counsel filed an opening brief on October 31, 2018 raising no issues and asking this court to review the record independently. On October 31, 2018, we advised Kimmick he had 30 days within which to personally submit any contentions or issues he wished us to

consider. After granting a request for extension of time, Kimmick filed a supplemental letter brief on December 17, 2018.

Kimmick alleges in his brief that police officers committed misconduct by telling Kristin that Kimmick had raped someone else before asking her questions, and by “reprimand[ing]” Jennifer when she told the officers it was an “‘emotional rape.’” We do not agree.

Section 1473.6, subdivision (1)(3) authorizes a person no longer imprisoned or restrained (and, therefore, without standing to petition for a writ of habeas corpus) to file a motion to vacate a judgment when, as Kimmick alleges here, “[n]ewly discovered evidence of misconduct by a government official committed in the underlying case . . . resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment.” Here, we agree with the trial court that, while the conduct of the detectives is “plausibly subject to criticism,” it does not constitute misconduct within the meaning of the statute. Kimmick fails to show that the officers’ statements to each victim that Kimmick had raped another person resulted in any fabrication of evidence.

Jennifer provided the private investigator in 2006 a detailed account of the rape, including her screaming and attempts to fight Kimmick off. In addition, nowhere in the report of Jennifer’s 2006 interview with the private investigator is there an indication that the officers “reprimanded” Jennifer after she told them she felt as though she had been emotionally raped. None of the salient facts establishing Kimmick’s guilt changed between the statements she gave to police and the statement she gave to the private investigator in 2006.

The same is true with respect to Kristin's statements. At no point in her declaration does Kristin deny she told police officers that Kimmick grabbed her breast, and the private investigator's report does not contain any such denial. The mere statement that she felt police "may have misled her," without more, does not establish a causal link between the officers' conduct and her statement that Kimmick grabbed her breast. Kimmick has therefore failed to show that Kristin provided false evidence to the officers after they told her he had raped another woman.

Additionally, the statute requires a petitioner to file his or her petition within one year of the date the moving party discovered, or could have discovered, the evidence of misconduct beyond the moving party's personal knowledge. (§ 1473.6, subd. (d)(1).) Jennifer was interviewed by the private investigator and the police in 2006—11 years prior to Kimmick's petition—and he provides no explanation for why he did not timely file his petition.

We have examined the entire record before us and are satisfied that Kimmick's appointed appellate counsel fully complied with her responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The order is affirmed.

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STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.